to quit. If he does not do so plaintiff is entitled to come to court and ask for an order for possession. In our case the period of grace would be "21 days or upwards" depending on the day the notice to quit is given.

It is true that in his judgment in *Lau Khiok Chu* v. *Lim Pek Hung* [6] Simpson J. did express his opinion that rent having been duly tendered every month no rent was in arrear but the amount might be considered as owing as a debt. In that case appellant had no reason to refuse to accept the tender of rent. Assuming that the rents for April to June, 1963 had been tendered and rejected and according to *Lau Khiok Chu* v. *Lim Pek Hung* the amount would be considered as a debt. Payment of rents for July and October, 1963 were tendered and accepted. So that when plaintiff after demand sent a notice to quit dated 30th April, 1964 there can be no doubt that rent "lawfully due" for November, 1963 to 31st March, 1964 was in arrears for "21 days or upwards" on the date of the notice to quit.

In any event whether one takes the view that rents for April to June, 1963 are to be regarded as a debt or whether the view that such rents are not to be so regarded but as arrears of rent after demand in writing the result would be the same in this case.

It is incumbent upon plaintiff to make a demand for rent before he can say that rent is in arrear and that once lawful demand is made it is the duty of the defendant to pay. This view is strengthened by two cases. In *Chop Lean Yak* v. *Ng Ah Hee* [8] Spenser Wilkinson J. after referring to various authorities concerning the duty of the landlord to demand payment of rent said:—

"Upon these authorities I felt bound to hold that it is the duty of the landlord to make a demand for rent on the premises and that if he does not do so he cannot rely upon the proposition that rent is in arrears."

That case was referred to in *Penang Motors (1950) Ltd.* v. *Suah Motors* [9] where it was held that where rent was payable in advance and demand was made and rent paid the day after the demand rent was therefore not in arrear at the date of the service of the notice to quit. Rigby J. in the course of his judgment expressed his opinion on the question of demand at page 136 as follows:—

"where there is an agreement to pay rent monthly in advance, coupled with an obligation on the part of the landlord to make a demand for payment of such rent on the premises, then clearly there is a duty upon the tenant to pay the rent when it is so lawfully demanded on the premises. But there can be no default in payment unless and until that demand has been made. In my view, therefore, a tenant can only be said to be in arrears as from the date the lawful demand for payment is made and arrears can only be said to run from that date. The meaning of the word 'arrear' was considered in a Canadian case dealing with a contract requiring payment of monies. In that case the Court said — 'We take arrears to mean something which is behind in payment or which remains unpaid . . . It implies a duty and a default' (*Corbett* v. *Taylor*, (1864) 23 U.C.R. 454, C.A., *per cur.* at page 455)".

In the result for reasons given I hold that the rent payable is $145 per month and that as rent lawfully due was in arrear on the date of the notice to quit plaintiff is entitled to an order for possession under paragraph (a) subsection (1) of section 15 of the Rent Control Ordinance (Cap. 86). Costs to plaintiff I would assess at $300. However in this case the circumstances are such I consider that I am justified in exercising my discretion in favour of defendant on the question of suspending the order for possession. Therefore I order that the order for possession be suspended for as long as (1) the defendant pays the monthly rent of $145 regularly if and when it falls due; and (2) the defendant pays the sum of $2,175 for the period from 1st June, 1963 to 31st August, 1964 to cover arrears of rent and mesne profits, and cost of $300 within seven days.

Order accordingly.

IN RE APPLICATIONS OF (1) CHONG FYE LEE & (2) TOONG HING LOONG TIN MINING CO. LTD.

[O.C.J. (Azmi J.) September 16, 1964]

[J.B. — Originating Motions Nos. 2 and 3 of 1964]

Administrative Law — Judicial review — Certiorari — Whether revision includes revision by High Court under certiorari.

Practice and Procedure — Appeal — No revision where appeal lies — Courts of Judicature Act, 1964, ss. 2, 32, 33 and 34.

Mining Enactment, No. 69, ss. 100 to 102 — Whether warden of mines holding inquiries is subordinate court under Mining Enactment.

These were applications for orders of *certiorari* to quash orders of the warden of mines, Johore. A preliminary objection was taken that the court has no jurisdiction to hear the application by virtue of the provisions of section 34 of the Courts of Judicature Act, 1964, which provides "where an appeal lies from any decision in any civil matter and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed".

Held: (1) a warden of mines holding inquiries under the Mining Enactment is an inferior court within the meaning of the words given in the definition of "Subordinate Court" in section 2 of the Courts of Judicature Act, 1964;

(2) proceedings by way of revision would include revision under *certiorari* and therefore as the applicants in this case could have appealed but did not, their applications for *certiorari* must be dismissed.

Case referred to:—

(1) *R.* v. *Electricity Commissioner* [1924] 1 K.B. 171 at p. 204.

APPLICATIONS FOR ORDER OF *CERTIORARI.*

Punch Coomaraswamy for applicant in Motion No. 2 of 1964.

P. Mooney for applicant in Motion No. 3 of 1964.

M. Shanker for Yap Seong and Foong Swee Chow.

Cur. Adv. Vult.

Azmi J.: Counsel for both parties agreed that these two motions should be heard together.

According to the affidavits of the clerk to Messrs. Braddell Brothers, notices of motions and all connected papers were served on the chief clerk of the Mines Department on the 29th April, 1964.

These motions are for an order of *certiorari* to remove into this court and quash an order made by the warden of mines, Johore, on 3rd December, 1963, that Sublease Presentation No. 1698 in respect of land under M.C. No. 453 be cancelled.

Motion No. 2 of 1964 is supported by an affidavit sworn by Chong Fye Lee, the applicant, which discloses *inter alia* the following facts:

(a) On 3rd December, 1963, the warden of mines held an inquiry into a complaint by Yap Seong and Foong Swee Chow who are the registered lessees of the said mining certificate. The applicant and another, Liu Sinn Min, were the registered sublessees of the land at the date of the inquiry.

(b) The complaint was that the sublessees assigned their sublease to another without the written authority of the sublessors contrary to clause 7 of the sublease, and, secondly, that the sublessees had failed to pay tribute contrary to clause 1 of the sublease.

(c) The second complaint was not dealt with by the warden, nor was evidence given.

(d) The warden at the close of the hearing found that there had been a breach of clause 7 and ordered the cancellation of the sublease.

(e) Liu Sinn Min, the other sublessee, was not present at the inquiry since he was "not served with a subpoena", as the warden put it. The warden must have meant the summons under section 101(iii)(c) had not been served on Liu Sinn Min.

(f) The deponent said that he gave instructions to his solicitors to appeal against the order and verbal notice to that effect was given to the warden by the solicitors. On 12th December, 1963, the solicitors filed a notice of appeal against the order.

(g) It was subsequently found that the notice of appeal and the memorandum of appeal filed on 1st January, 1964 and out of time were a nullity by virtue of section 102(ii) of the Johore Mining Enactment, No. 69 (hereinafter referred to as the Enactment).

In motion No. 3 of 1964 the affidavit of Ng Aik Huan, the chairman of Toong Hing Loong Tin Mining Co. Ltd., sworn on 31st March, 1964, stated that about the 13th December, 1963, the deponent met Mr. Pan Kuo Chu, the managing director of Toong Hing Loong Mining Co. Ltd. and another in his office. They discussed the position of the company in the light of the cancellation of the sublease to Messrs. Chong Fye Lee and Liu Sinn Min by the warden of mines, Johore. He also stated that he communicated with a solicitor and was told that the company could not appeal against the decision of the warden.

Mr. Pan Kuo Chu, the managing director of Toong Hing Loong Tin Mining Company, also swore an affidavit and referred to the inquiry held by the warden, the facts of which are more or less similar to those referred in the affidavit in motion No. 2 of 1964. In addition, however, in referring to the alleged assignment of the said sub-lease he says that the alleged document of assignment was some hupthong* and suggests that the question whether such a document is an assignment or not is a question of law and that Mr. Chong, as a witness, should not have been asked for or allowed to express an opinion on the matter.

The affidavit also disclosed other facts but I do not propose to refer to them as in my opinion they are not necessary for the purpose of my judgment on the preliminary objection made by Mr. Shankar.

At the outset of the hearing Mr. Shankar took a preliminary objection that the court has no jurisdiction to hear these applications by virtue of the provisions of section 34 of the Courts of Judicature Act, 1964 (hereinafter referred to as the Act), and submitted that these applications should be dismissed without going into their merits.

It was agreed by all counsel that the act would apply to these matters because it came into force on the 16th March, 1964, and the applicants obtained leave to file these motions subsequent to that date.

Section 34 of the Act reads as follows:

> "Where an appeal lies from any decision in any civil matter, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of a party who could have appealed."

Mr. Shankar submitted that "revision" in this section includes revision or review by the High Court under *certiorari.* He went further and said

* Chinese expression for contract.

that the warden in exercise of his powers under sections 101 and 101A of the Enactment is a court, and is therefore an inferior court within the meaning of the definition of "Subordinate Court" given in the Act.

I propose to refer to certain relevant provisions in the Enactment in that behalf.

(a) Section 100 vests in the warden with the powers of a magistrate of the first class for the purpose of compelling the attendance of witnesses, maintaining order in his court, and otherwise of carrying into effect the provisions of this Enactment. (The words underlined were added by a subsequent Enactment No. 12 of 1939).

(b) Section 101 empowers a warden to enquire into and decide all disputes between occupiers of mining lands, either amongst themselves or in relation to themselves and third parties, concerning any of the matters given in that section.

Under sub-section (ii) of section 101 he has power in his discretion to cancel a sublease upon proof to his satisfaction that the sublessee has committed a breach of clause 7 of the sublease in Form (iv).

Under section 101A the mode of procedure in any complaint is provided.

In sub-section (i) it is provided that in holding an enquiry the warden may take any evidence produced before him with or without affirmation, and record any such evidence in writing or not as in each case respectively, he thinks fit.

Among other things it is provided, under sub-section (iii)(c), "If any party interested shall have been duly summoned by the warden to attend such enquiry and shall have made default in so doing, it shall be lawful for the warden to hear and decide such complaint in the absence of such party, notwithstanding that the interests of such party may be prejudicially affected by such decision."

He is also entitled to appoint one or more assessors to be nominated by him, to assist him in such enquiry. He is also given authority under section 101(iii)(g) to order any person summoned to attend as an assessor who without lawful excuse fails to attend as required, to a fine not exceeding fifty dollars.

I also find the words "Warden's Court" in sub-sections (v), (vi) and (vii) of section 101A.

Section 101A was added by amending Enactment No. 12 of 1939.

There is, however, in section 103 a provision that when an appeal from the order or decision of the warden is made by a person aggrieved by such order, the warden shall be deemed to be a party to such appeal. This provision would appear to indicate that a warden sitting to hear a complainant under sections 101 and 101A is a mere statutory body.

In my opinion, having regard to the fact that a warden hearing these complaints is referred to as a Warden's Court in the various sub-sections of the new sub-section 101A, and also having regard to the powers given to him under the provisions, to which I have referred previously, in the exercise of his civil jurisdiction, I am of the opinion that a warden holding such enquiries is an inferior court within the meaning of the words given in the definition of "Subordinate Court" in section 2 of the Courts Judicature Act.

In order to dispose of this matter I think I must further decide whether "a proceeding by way of revision" would include the exercise of powers in *certiorari*.

Atkin L.J. in *R.* v. *Electricity Commissioners* [1] says as follows:

> "Both writs (of prohibition and *certiorari*) are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed."

In my opinion section 34 of the Act should be read with sections 32 and 33.

Section 32 reads as follows:

> "Every High Court may call for and examine the record of any civil proceedings before any Subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any decision recorded or passed, and as to the regularity of any proceedings of any such Subordinate Court.".

Section 33 reads as follows:

> "In the case of any civil proceedings in a Subordinate Court the record of which has been called for, or which otherwise comes to its knowledge, every High Court may give such orders thereon, either by directing a new trial or otherwise, as seems necessary to secure that substantial justice is done."

I would say that the proceedings referred in these two sections are proceedings by way of revision. Having regard to the provisions of sections 32 and 33, I would be inclined to think that they include proceedings in *certiorari* for the purpose of inquiring into the legality of the decision of an inferior court. For these reasons I am of the opinion that proceedings by way of revision referred to in section 34 would include revision under *certiorari*.

The next point I think I have to consider is whether in this case it could be said that the applicants are "a party who could have appealed". I think they are because under section 102 of the

Enactment, being persons aggrieved by the decision of the warden, they could appeal, and their inability to do so was due entirely to their negligence or default.

For these reasons these two applications are dismissed with costs.

Applications dismissed.

Solicitors: *Braddell Bros.; Skrine & Co.; Shearn, Delamore & Co.*

NGU EE NGUOK v. LEE AI CHOON

[A.C.J. (Lee Hun Hoe J.C.) September 21, 1964]

[Sibu — Civil Appeal No. CA/10 of 1964]

Gaming — Gambling contract — "Hwei" — Claim against head of hwei — Promissory Note — Onus of proof.

Where a person alleges that a head of a *hwei* is liable on the default of a member, the onus of proof lies on him, and in this case as the respondent had not discharged the onus of proof, her claim should have been dismissed.

[**Editorial Note:** See article on "Hway" in [1938] M.L.J. xi and reference may be made to *Ramasamy* v. *Muniappan* [1940] M.L.J. 290 and *Ameer Batcha* v. *Kunjumon* [1959] M.L.J. 59.]

Cases referred to:—

(1) *Ngu Ee Ngok (f)* v. *Chiang Siok Ing (f)* Sibu High Court Civil Appeal No. CA/1/64.

(2) *Kong Mee Choon* v. *Tang Hie Hiong (f)* Sibu High Court Civil Appeal No. 17/61.

(3) *Soo Hood Beng* v. *Khoo Chye Neo* (1896) 4 S.S.L.R. 115.

MAGISTRATE'S CIVIL APPEAL.

Parties in person.

Lee Hun Hoe J.C.: This is an appeal from the decision of the trial magistrate of the Court of the Small Causes in Sibu.

It is not disputed that appellant was the head of the "hwei" and respondent a member of the said "hwei". Respondent said on 10.5.64 she gave appellant $200 and in return appellant gave her a receipt. This receipt in actual fact is a sort of promissory note signed by the member who tendered the "hwei", in this case Wong Tien Hock, and also signed by Ling Hung Moi as a guarantor. Wong Tien Hock defaulted. Respondent sued appellant as head of the "hwei" and Ling Hung Moi as a guarantor. The trial magistrate gave judgment for respondent against appellant in the sum of $200 with costs of $14. He mentioned nothing about Ling Hung Moi. It must be assumed that he dismissed respondent's claim against Ling Hung Moi. Against this judgment appellant has now appealed.

As this is a claim of "hwei" money I do not believe respondent gave $200 to appellant. She said she gave appellant $200 no doubt because the promissory note indicated $200 had been borrowed by Wong Tien Hock. It is common knowledge that a member paid the amount less interest, that is the sum offered as interest by the member who successfully tendered the "hwei". Respondent must have paid less than $200 although she would eventually receive $200 if the "hwei" concluded successfully.

In her statement of claim respondent alleged that Wong Tien Hock is a fictitious person. She claimed that appellant as head of the "hwei" and Ling Hung Moi as a guarantor were liable to her. Appellant by her written defence contended that there was no cause of action against her and that the guarantor was the person liable to respondent. However respondent has not appealed against that part of the trial magistrate's decision.

Appellant relied on the case of *Ngu Ee Ngok (f)* v. *Chiang Siok Ing (f)*.[1] In that case appellant was the head of a "hwei" and respondent a member of the "hwei". One of the members defaulted and respondent sued appellant in the lower court and succeeded. Allowing the appeal McGilligan J. held that on the evidence appellant was not liable to respondent. He also stated that each case must depend on its own facts. In another "hwei" case of *Kong Mee Choon* v. *Tang Hie Hiong (f)*[2] Lascelles J. in the course of his judgment at page 2 said:

> "In a *hway* there is only one person who has anything to do with the running of it and that is the manager. He is the person responsible for collecting the subscriptions, receiving tenders and paying out to the successful tenderer. He is in the supreme position of trust and I understand that in many instances he is held responsible if any member defaults. The agreement is between each member and the manager or head and not between the members themselves. (Williams C.J. in *Lee Pee Eng* v. *Ho Sin Leow* [1958] S.C.R. 18)."

I agree with the view expressed by Lascelles J. The head or manager of a "hwei" is the central figure and is a person trusted by each and every member of such a "hwei". Sometime one member may not even know another member. Everything in a "hwei" is transacted through the head or manager. I think it can be said that there is no privity of contract between the members.

The view that if a member defaults the head may be held liable must depend on the evidence adduced before the court. The onus is on the person who alleged that the head was liable, in this case the respondent. In this case she gave evidence in four lines and produced the promissory note in Chinese which does not appear to have been translated. I do not know whether the trial magistrate understood it. No evidence was led as to the nature of the "hwei" and to show the court in what way the head or manager was liable. One would have thought respondent would